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No. 791

In the Supreme Court of the United States

OCTOBER TERM, 1959

EDWARD J. BLOOM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (Pet. i–xvi) is reported at 272 F. 2d 215.

JURISDICTION

The judgment of the Court of Appeals was entered on November 2, 1959 (Pet. xvii). A timely petition for rehearing was denied on January 20, 1960. The petition for a writ of certiorari was filed March 15, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

This action was instituted by the United States against petitioner, an officer of a corporation, to re-

cover the amount of income and social security taxes withheld from wages of employees of the corporation but not paid over to the United States. The questions are:

1. Whether such an action is timely if brought within six years after the date of the assessment against the officer, although more than six years after the assessment against the corporation.

2. Whether, in the proceedings resulting in the judgment below, petitioner was denied due process of law.

3. Whether the evidence supports the finding that petitioner was responsible for collecting and paying over the withheld taxes, and that he willfully failed to do so.

STATUTES INVOLVED

The relevant provisions of the Internal Revenue Code of 1939, Sections 1400, 1401, 1430, 1622, 1627, 2707, 3312, and 3661, are printed in the Appendix, *infra*, pp. 9–12.

STATEMENT

Petitioner was president, chief executive officer and majority stockholder of Idaho Smelting, Inc. ("Idaho"), a company engaged in the scrap aluminum business (Pet. ii-iii). Idaho had a line of credit with a bank under which credit was extended under an overdraft system of banking, and Idaho was required to buy and sell aluminum on a trust receipts basis (Pet. iii). In September 1947, when Idaho was substantially indebted to the bank, the metal market dropped drastically (*ibid.*). Thereafter, the bank "gradually exerted pressure on [Idaho] to

liquidate its inventory so as to insure that the bank will not suffer a loss on its loans" (Pet. iv). Idaho was liquidated during 1948 and by the end of the year, when its indebtedness to the bank had been paid, the company was practically without funds (*ibid.*).

On January 31, 1948, when the corporation filed a tax return for the last quarter of 1947, for the first time it failed to include payment for the income and social security taxes that it had withheld from its employees (Pet. iv). Throughout the remaining months of 1948, as the corporation continued to liquidate its inventory to satisfy the bank's demands, it filed returns showing the amount of income and social security taxes that had been withheld, but the taxes (with the exception of two quarters' social security taxes) were not paid (*ibid.*). The Government assessed the delinquent taxes against the corporation for each quarter, the last assessment having been made on May 17, 1949 (*ibid.*). In July, 1948, the Government filed tax liens against the corporation (*ibid.*).

On November 23, 1949, the Commissioner of Internal Revenue, acting under Section 2707(a) of the Internal Revenue Code of 1939 (*infra*, pp. 10–11), assessed against petitioner and his wife a liability for $13,448.45, which represented the amount of delinquent withheld taxes originally assessed against the corporation. The assessment was made on the ground that they were "persons who had willfully failed to pay, collect, or truthfully account for and pay over" the withheld taxes. When petitioner and his wife refused to pay the assessment, the instant suit was filed on No-

vember 18, 1955, to reduce the unpaid assessment to judgment (Pet. v).

After trial without a jury, the district court held that petitioner "was the responsible officer" of Idaho "whose duty it was to collect, account for and pay over" the withheld income and social security taxes, and that he had "willfully failed" to do so (Pet. v-vi), and entered judgment against him for $19,292.79 (Pet. xviii). The court held, however, that petitioner's wife was not liable for the assessment, and entered judgment in her favor (Pet. xix).

The court of appeals unanimously affirmed. In a comprehensive opinion (Pet. i-xvi), the court held that the suit was timely filed, since under the applicable statute of limitations the six-year period ran from the date the assessment was made against petitioner and not from the date the tax was assessed against the corporation (Pet. vi-x); that petitioner's contention that he had been denied due process of law because the Commissioner's assessment of his liability was made *ex parte* "is without merit since it completely overlooks the fact that he has been held liable not on the basis of an ex parte assessment but on the basis of a court judgment" (Pet. xi); that the trial court's finding that petitioner "was the responsible [corporate] officer whose duty it was to collect, account for, and pay over the withheld taxes" (Pet. vii) "is supported by substantial evidence" (Pet. xiv); and that petitioner's failure to pay over the withheld taxes was "willful within the meaning of Section 2707(a)" (Pet. xvi).

ARGUMENT

Section 2707 (a) and (d) of the 1939 Internal Revenue Code (*infra*, pp. 10–11) provide that a corporate officer who willfully fails to perform his duty to pay over to the Government income and social security taxes that the corporation has withheld from its employees shall be "liable to a penalty of the amount of the tax * * * not * * * paid over, to be assessed and collected in the same manner as taxes are assessed and collected." In the instant case, both courts below held that petitioner was the corporate officer who was responsible for paying over the withheld taxes, and that his failure to do so was willful. We submit that in affirming the judgment against petitioner in the amount of the taxes that he thus failed to pay over, the court of appeals correctly applied settled legal principles to the facts of this case, and that no issue is presented which warrants further review.

1. Section 3312(a) of the 1939 Code provides that all Internal Revenue taxes (with certain exceptions not here pertinent) shall be assessed within four years after they become due. Section 3312(d) provides that where a tax has been assessed within the applicable statutory period of limitations, a suit for its collection must be begun within six years after the assessment of the tax. The assessment of petitioner's liability under Section 2707 was made on November 23, 1949, which was less than 4 years after the corporation's initial failure on January 31, 1948, to pay the withheld taxes. The instant suit was instituted on November 18, 1955, which was less than 6 years after the assessment of the liability on November 23, 1949.

Thus, both the assessment of the liability and the instant suit for its collection were timely filed.

Petitioner contends (Pet. 25–27) that the statutory period begins to run from the date of the assessment of the tax against the corporation rather than its assessment against him. As the court of appeals pointed out (Pet. x), however, petitioner's liability is not that of the corporation, but a "distinct and separate statutory liability" for which a separate assessment is made. The limitations period runs from the date of the latter. *United States* v. *Updike,* 281 U.S. 489; *Signal Oil & Gas Co.* v. *United States,* 125 F. 2d 476, 482 (C.A. 9).

2. Petitioner's contention that he was not the officer of his corporation responsible for the payment to the government of the taxes withheld from its employees presents only a factual question that both courts resolved against petitioner. In its review of the evidence on this point, the court of appeals pointed out (Pet. xii) that there was testimony by the vice president "that appellant was in charge of the entire operation, that he made the final decisions, and that he decided what creditors were to be or were not to be paid." Petitioner's lengthy argument (Pet. 29–40) that he could not control the disbursement of corporate funds in its bank account because they were trust funds for the benefit of the bank confuses the security for the loan and the loan itself. The bank's loans to the corporation were made upon the security of trust receipts, and those receipts and the property that they represented were not subject to petitioner's control. But the proceeds of the loan were on deposit in the

corporation's regular checking account and these were regular funds of the corporation over which petitioner, as the chief executive, had full control. As the court below noted (Pet. xii), bank officers testified "that the corporation was free to draw on its account to the extent that it had funds in the bank."

3. Petitioner contends (Pet. 56–60) that a willful failure to pay over withheld taxes within the meaning of Section 2707 is not established unless it be shown that he had an evil motive or bad purpose. The contention is fully answered by the court below (Pet. xv-xvi), which applied the settled rule that a voluntary, conscious and intentional decision of a corporate officer to pay creditors with funds representing withheld taxes belonging to the United States is sufficient to impose civil liability therefor upon the officer. See *Paddock* v. *Siemoneit*, 147 Tex. 571, 218 S.W. 2d 428; *In re Haynes*, 88 F. Supp. 379 (D. Kan.); *Kellems* v. *United States*, 97 F. Supp. 681 (D. Conn.); *Nugent* v. *United States*, 136 F. Supp. 875 (N.D. Ill.); *Levy* v. *United States*, 140 F. Supp. 834 (W.D. La.).[1] Here the record shows (Pet. xii-xiii) that petitioner himself filed the quarterly corporate tax returns without paying the withheld taxes, although the corporation then had funds in its account

[1] Petitioner's contention (Pet. 28–29, 45–48) that he was denied due process of law because the liability was assessed against him *ex parte* has no substance. As the court of appeals pointed out (Pet. xi), petitioner was held liable for the withheld taxes "not on the basis of an ex parte assessment but on the basis of a court judgment." The judgment was not, as petitioner suggests (Pet. 28–29), based on the Government's prima facie opening evidence, but upon the entire record, in-

in excess of the taxes due, which were used to pay other bills.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1960.

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cluding petitioner's testimonial and documentary evidence, and the Government's rebuttal evidence. The validity of the levies that were made against petitioner based on the assessment is not involved in this suit. Cf. *Phillips* v. *Commissioner*, 283 U.S. 589. The fact that the suit was dismissed against petitioner's wife indicates nothing as to the sufficiency of the evidence against petitioner.

APPENDIX

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 1400 [as amended by Sec. 1 of Social Security Act Amendments of 1947, c. 510, 61 Stat. 793]. RATE OF TAX. TAX.

In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in section 1426(a)) received by him after December 31, 1936, with respect to employment (as defined in section 1426(b)) after such date:

(1) With respect to wages received during the calendar years 1939 to 1949, both inclusive, the rate shall be 1 per centum.

* * * * *

(26 U.S.C. 1952 ed., Sec. 1400.)

SEC. 1401. DEDUCTION OF TAX FROM WAGES.

(a) Requirement.—The tax imposed by section 1400 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid.

* * * * *

(26 U.S.C. 1952 ed., Sec. 1401.)

SEC. 1430 [as amended by Sec. 903, Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360]. OTHER LAWS APPLICABLE.

All provisions of law, including penalties, applicable with respect to any tax imposed by section 2700 or section 1800, and the provisions of

section 3661, shall, insofar as applicable and not inconsistent with the provisions of this subchapter, be applicable with respect to the taxes imposed by this subchapter.

(26 U.S.C. 1952 ed., Sec. 1430.)

SEC. 1622. INCOME TAX COLLECTED AT SOURCE.

(a) [as added by section 2(a) of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126 and amended by Sec. 501, Revenue Act of 1948, c. 168, 62 Stat. 110] *Requirement of Withholding.*—Every employer making payment of wages shall deduct and withhold upon such wages a tax equal to 15 per centum of the amount by which the wages exceed the number of withholding exemptions claimed multiplied by the amount of one such exemption as shown in subsection (b) (1).

* * * * *

(26 U.S.C. 1946 ed., Supp. II, Sec. 1622.)

SEC. 1627 [as added by Section 2(a) of the Current Tax Payment Act of 1943, *supra*]. OTHER LAWS APPLICABLE.

All provisions of law, including penalties, applicable with respect to the tax imposed by section 1400 shall, insofar as applicable and not inconsistent with the provisions of this subchapter, be applicable with respect to the tax under this subchapter.

(26 U.S.C. 1952 ed., Sec. 1627.)

SEC. 2707. PENALTIES.—

(a) Any person who willfully fails to pay, collect, or truthfully account for and pay over the tax imposed by section 2700(a), or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty of the amount of the tax evaded, or not paid, collected, or accounted for and paid over, to be assessed and collected in the same manner as taxes are assessed and collected. No

penalty shall be assessed under this subsection for any offense for which a penalty may be assessed under authority of section 3612.

* * * * * *

(d) The term "person" as used in this section includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

(26 U.S.C. 1952 ed., Sec. 2707.)

SEC. 3312. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

* * * * * *

(a) *General Rule.*—All internal revenue taxes shall (except as provided in subsections (b), (c), and (d)) be assessed within four years after such taxes became due, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of five years after such taxes became due.

* * * * * *

(d) *Collection after Assessment.*—Where the assessment of any tax imposed by this title has been made within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court, but only if begun—

(1) Within six years after the assessment of the tax, or

(2) Prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer.

(26 U.S.C. 1952 ed., Sec. 3312.)

SEC. 3661. ENFORCEMENT OF LIABILITY FOR TAXES COLLECTED.

Whenever any person is required to collect or withhold any internal-revenue tax from any other person and to pay such tax over to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.

(26 U.S.C. 1952 ed., Sec. 3661.)

U. S. GOVERNMENT PRINTING OFFICE: 1959